TEGUH KEMAJUAN SDN BHD v. PENTADBIR TANAH, KOTA TINGGI & ANOR

MAHKAMAH TINGGI MALAYA, JOHOR BAHRU
GUNALAN MUNIANDY JC
[JUDICIAL REVIEW NO: 25-36-07-2013]
4 DECEMBER 2014

ADMINISTRATIVE LAW: *Judicial review – Application for – Cross examination of deponent to affidavit – Elements of necessity and relevancy – Whether there are matters of fact in serious conflict yet to be resolved on vital affidavit evidence – Cross-examination of deponent to affidavit in judicial review cases only in rare and limited circumstances – Rules of Court 2012, O. 24 rr. 3 & 7; O. 32 r. 1; O. 38 r. 2(2); O. 53 r. 6*

ADMINISTRATIVE LAW: *Judicial review – Application for – Discovery – Circumstances where discovery should be allowed in application for judicial review – Exercise of court's discretion – Essential elements for an order of discovery to be granted – Necessity and relevancy – Fishing not permitted – Discovery in judicial review cases only in rare and limited circumstances – Rules of Court 2012, O. 24 r. 13, O. 53 r. 3*

CIVIL PROCEDURE: *Affidavits – Cross-examination of deponent to affidavit – Elements of necessity and relevancy – Whether there are matters of fact in serious conflict yet to be resolved on vital affidavit evidence – Cross-examination of deponent to affidavit in judicial review cases only in rare and limited circumstances – Rules of Court 2012, O. 24 rr. 3 & 7; O. 32 r. 1; O. 38 r. 2(2); O. 53 r. 6*

CIVIL PROCEDURE: *Discovery – Inspection of documents – Application to inspect documents in judicial review proceedings – Exercise of court's discretion – Essential elements for an order of discovery to be granted – Necessity and relevancy – Fishing not permitted – Discovery in judicial review cases only in rare and limited circumstances – Rules of Court 2012, O. 24 r. 13, O. 53 r. 3*

The applicant (State Secretary Johor Incorporated 'SSI') had obtained leave to institute judicial review under O. 53 r. 3 of the Rules of Court 2012 ('ROC') for an order of *certiorari* to quash the acquisition by the respondent of the subject land of which the applicant was the registered proprietor. *Vide* encl. 36, the applicant sought an order of discovery against the respondent of documents and cross-examination of deponents of affidavits pursuant to O. 32 r. 1; O. 24 rr. 3 and 7, O. 38 r. 2(2) and O. 53 r. 6 of the ROC. The applicant sought that the respondent and the SSI be required to file and serve on the applicant a list of documents related to the acquisition of the subject land and serve on the applicant named documents in the possession, custody or control of the respondent and SSI. The applicant also sought that the deponent of the affidavit filed on behalf of the respondent; the valuers who prepared valuation reports for respondent at the s. 12 of the Land Acquisition Act 1960 ('LAA') enquiry; and the deponent of the affidavits sworn on behalf

of SSI be required to be present in court to be cross-examined by the applicant's counsel. The applicant contended that discovery of documents and cross-examination were relevant and necessary to enable the whole truth to be revealed to the court and to enable justice to be done. The main issues arising for determination were: (i) whether the crucial factor for discovery and cross-examination is a necessity and not merely relevancy; (ii) whether the documents sought which concerned the process of land acquisition under s. 3(2) of the LAA had any connection or nexus with the reliefs claimed in the judicial review application which was basically to challenge the issuance and service of the Form K; (iii) whether the applicant had failed to show rare and special circumstances to justify the orders sought being made; and (iv) was the validity of the acquisition process relevant at this stage. The applicant submitted that there were several important matters of fact and law of significance that were in serious dispute between the parties to the judicial review, and hence the correctness and accuracy of the respondent's and SSI's affidavit averments were being questioned and challenged. The applicant therefore contended that any critical evaluation of the conflicting affidavits would not be able to resolve the serious dispute and that production of the vital documents referred to was necessary to fairly resolve the dispute.

Held (allowing application):

(1) While O. 53 r. 6 of the ROC recognises the right of any party to a judicial review application to apply for discovery and inspection of documents or cross-examination of deponents of affidavits pursuant to the relevant provision of the ROC, the discretion lies with the court whether to grant the order sought. The facts and circumstances of each particular case are an important consideration in determining whether these are valid grounds for the powers to be invoked; *(Rekapacific Bhd v. Securities Commission & Anor & Other Appeals,* refd; *Leisure & Allied Industries v. Udaria Sdn Bhd,* refd). (para 13)

(2) The necessity principle for the production of any documents for inspection or to the court is incorporated in O. 24 r. 13 of the ROC. The three essential elements necessary for an order of discovery to be granted are: (i) the matter sought to be discovered must be a 'document'; (ii) the document must be 'relevant'; and (iii) the document must be or have been in the 'possession, custody or power' of the party against whom the order for discovery is sought; *(Yekambaran Marimuthu v. Malayawata Steel Berhad*, refd); *ABX Logistics (Malaysia) Sdn Bhd v. Overseas Bechtel (Malaysia) Sdn Bhd*, refd). (paras 17, 18 & 19)

(3) The test, therefore, is necessity and not fairness *per se*. Discovery for the purpose of mere fishing will not be permitted as it would be unduly oppressive to the party giving discovery. The test for relevancy is found in *Manilal & Sons (Pte) Ltd v. Bhupendra KJ Shan (T/A Jb International)*; *Nguang Chan aka Nguang Chan Liquor Trader & Ors v. Hai-O Enterprise Bhd & Ors* (refd). (para 20)

(4) In judicial review proceedings, cross-examination and/or discovery can be permitted only in rare and limited circumstances. Among the exceptions is where there are serious disputes on fundamentally important questions of fact. A distinction must be drawn between discovery in a JR and a writ action. Basically, for the former it will be granted only on a limited basis where it is satisfactorily shown to be necessary in the interests of justice. Relevancy of the documents is undoubtedly a crucial factor to satisfy the test but it cannot be equated with necessity which is the predominant factor. The applicant, thus, bears the onus of establishing this condition precedent for discovery to be ordered; *Rekapacific Bhd v. Securities Commission & Anor & Other Appeals,* refd. (para 23)

(5) The deponent had made several averments of fact that were the subject of serious dispute although they related to the validity of the decision of the State Authority to acquire the subject land purportedly needed by any person or corporation for a private purpose. These were matters of fact in serious conflict that were yet to be resolved on vital affidavit evidence and hence, would justify cross-examination of the deponent to fairly decide the issue in dispute in the judicial review. (para 27)

(6) Based on the established principles as adverted to relating to discovery and cross-examination of witnesses in judicial review proceedings that the applicable test is whether the vital elements of relevancy and necessity for fair disposal of the matter in dispute have been satisfied, discovery and cross-examination were allowed. (para 32)

Case(s) referred to:

ABX Logistics (Malaysia) Sdn Bhd v. Overseas Bechtel (Malaysia) Sdn Bhd [2003] 7 CLJ 357 HC ***(refd)***

Datuk Amar James Wong Kim Min & Anor v. Pendaftar Pertubuhan [2006] 8 CLJ 106 HC ***(refd)***

Leisure & Allied Industries Pty Ltd v. Udaria Sdn Bhd [1979] 1 LNS 42 FC ***(refd)***

Manilal & Sons (Pte) Ltd v. Bhupendra KJ Shan (T/A Jb International) [1981] 1 LNS 204 HC ***(refd)***

Nguang Chan aka Nguang Chan Liquor Trader & Ors v. Hai-O Enterprise Bhd & Ors [2009] 5 MLJ 40 CA ***(refd)***

Re McGuigan's Application [1994] NI 143 CA ***(refd)***

Rekapacific Bhd v. Securities Commission & Anor & Other Appeals [2005] 2 CLJ 108 CA ***(refd)***

Wallace Smith Trust Co Ltd (in liq) v. Deloitte Haskins & Sells (a firm) and Another [1996] 4 All ER 403 ***(refd)***

Yekambaran Marimuthu v. Malayawata Steel Berhad [1994] 2 CLJ 581 HC ***(refd)***

Legislation referred to:

Land Acquisition Act 1960, ss. 3(1)(b), (c), (2), 8, 12

Rules of Court 2012, O. 24 rr. 3, 7, 13, O. 32 r. 1, O. 38 r. 2(2), O. 53 rr. 3, 6

A *For the applicant - Yeo Yang Poh (Grace Teng Peck Yin with him); M/s Yeo Chambers*
For the 1st respondent - Shahrizal Shaari, Assistant LA, State Legal Advisor, Johore
For the 2nd respondent - G Rajasingam (Nik Azila with him); M/s Shearn Delamore & Co

Reported by Amutha Suppayah

B

JUDGMENT

Gunalan Muniandy JC:

[1] This is an application *vide* encl. 36 for discovery of documents and cross-examination of deponents of affidavits pursuant to O. 32 r. 1; O. 24 rr. C 3 and 7, O. 38 r. 2(2); and O. 53 r. 6 of the Rules of Court, 2012 ('ROC') in a judicial review ('JR') application. The applicant prayed, briefly, for these orders:

(1) The respondent and the State-Secretary of Johor (State Secretary Incorporated – 'SSI') be required to file and serve on the applicant a list D of documents related to the acquisition of land held under GRN 82359 Lot 1208, Mukim of Pengerang District of Kota Tinggi, Johor ('the subject land') and serve on the applicant named documents in the possession, custody or control of the respondent and SSI;

E (2) Mohd Nazid b. Jasiman, the deponent of the affidavit filed on behalf of the respondent; the valuers who prepared valuation reports for respondent at the s. 12 of the Land Acquisition Act, 1960 ('LAA') enquiry – Rozana Zakaria and Abdul Rahman b. Md. Karim; and Dr. Badrul Hisham b Kassim, the deponent of the affidavits sworn on behalf of SSI be required to be present in court to be cross-examined by F the applicant's counsel; and

(3) Costs in the cause.

Grounds Of Application

G **[2]** The brief grounds as expressed in the applicant's affidavit in support are listed in the application as follows:

(a) Discovery of documents and cross-examination are necessary in this case, because they will enable the whole truth to be revealed to the court, and will enable justice to be done;

H (b) The respondent, being a public-decision-maker, ought to be ordered to make discovery of the documents and materials on which he based his decision;

(c) SSI has referred to and relied on several documents in SSI's affidavit dated 29 January 2014. These documents ought to be produced and I disclosed to the court and to the parties;

(d) The documents sought to be discovered are clearly relevant to the subject matter of the judicial review;

(e) Discovery of documents will save costs;

(f) En Mohd Nazid bin Jasiman has deposed an affidavit dated 10 December 2013. He must be able to stand to scrutiny on what he has deposed. Cross-examination will enable the court to better understand the true facts and circumstances of this case, and to make the relevant findings of fact more accurately; and

(g) Important questions of fact are in serious dispute (eg, what transpired at the 's. 12 enquiry', whether the requirements of s. 3 had been fulfilled, etc).

(h) The two persons involved in the valuation in this case, namely, valuers Rozana bt Zakaria and Abdul Rahman bin Md Karim, ought to be made available for cross-examination with regard to their roles in this matter.

(i) Dr Badrul Hisham bin Kassim has deposed an affidavit dated 29 January 2014 for and on behalf of SSI. He must be able to stand to scrutiny on what he has deposed. Cross-examination will enable the court to better understand the true facts and circumstances of this case, and to make the relevant findings of fact more accurately.

Objections To Discovery And Cross-Examination Of Deponents

[3] The objections taken by the respondent are on the following grounds:

Discovery

(1) It is not explained plainly and clearly how the documents could enlighten the court.

(2) Asking for production of all documents relating to the agreements entered into by SSI were not relevant to the land acquisition process and should rightly be rejected.

(3) The application is unclear and vague.

Cross-Examination

(1) Application to cross-examine the respondent and the valuers is against the principles of JR.

(2) This JR was brought on affidavit evidence. It, therefore, may be opposed by the evidence alone.

(3) Deponent/first respondent had only exercised quasi-judicial functions and was not involved in approval of the acquisition process.

(4) The other persons to be cross examined were valuers who were not relevant to the JR and only relevant to the land reference proceedings on the issue of compensation for the scheduled land.

(5) No special and exceptional circumstances were shown to allow cross-examination of the deponents.

[4] SSI objected to encl. 36 in gist on these grounds:

(1) The documents sought to be discovered are irrelevant to the application, as they are not connected to the actual merits of the JR action.

(2) L.36 is misconceived and not maintainable in law and fact.

(3) As relevancy is not established, it is a fishing expedition and thus, an abuse of the court process. No provision in the LAA gives the right to ask for documents in compulsory acquisition.

(4) Some of the documents sought are confidential concerning which SSI are bound by confidentiality clauses in the agreements with the third parties concerned. Prior sanction is required from parties involved, one Dialog GR and the Government of Johor.

(5) Document in para. 4 (d) of L.46 not in the possession and custody of SSI.

(6) Reason given by the applicant for cross-examination of deponent of SSI's affidavit is not valid and sufficient. Rare and special circumstances not shown to justify the order sought on grounds of relevancy to the reliefs sought under the JR and the grounds relied upon.

Main Issues For Determination

(1) Whether the crucial factor for discovery and cross-examination is necessity and not merely relevancy?

(2) Whether the documents sought which concern the process of land acquisition under s. 3(2) of the LAA have any connection or nexus with the reliefs claimed in the JR application which is basically to challenge the issuance and service of the Form K?

(3) Whether the applicant had failed to show rare and special circumstances to justify the orders sought being made?

(4) Is the validity of the acquisition process relevant at this stage?

Factual Background

[5] The applicant had obtained leave to institute judicial review under O. 53 r. 3, ROC for an order of *certiorari* to quash the acquisition by the respondent of the subject land of which the applicant was the registered proprietor. State Secretary Johor ('SSI') being the applicant in the land acquisition process effected pursuant to s. 3(1)(b) of the LAA had been granted leave to participate in these proceedings.

[6] *Vide* encl. 36, the applicant seeks an order of discovery against the respondent for specified documents relating to the acquisition, namely:

(i) Acquisition-application documents required under s. 3 of the Land Acquisition Act 1960 ("the Act"), ie, the application for acquisition, the project proposal, layout and acquisition plan, and preliminary valuation;

(ii) Detailed EIA Report (disclosed by the respondent in his exh. 'MNJ-3'); A

(iii) Detailed feasibility study (mentioned by SSI in its exh. 'BHK-6'); and

(iv) Agreements and MOUs.

[7] As for SSI, the respondent sought production by SSI of these specified documents: B

(i) SSI's application dated 25 April 2012 (disclosed in para. 16 of SSI's affidavit);

(ii) Acquisition-application documents required under s. 3 of the Act, ie, the application for acquisition, the project proposal, layout and acquisition plan, and preliminary valuation; C

(iii) MOU dated 8 June 2009 (disclosed by SSI in its exh. 'BHK-6', which is a document of public disclosure);

(iv) MOU dated 20 July 2009 (disclosed by SSI in his exh. 'BHK-6', which is a document of public disclosure); D

(v) Letter of approval dated 6 October 2010 (disclosed by SSI in its exh. 'BHK-6', which is a document of public disclosure); and

(vi) 'Development Cum Joint Venture Agreement' dated 13 May 2011 (disclosed in para. 19.7 of SSI's affidavit). E

[8] In the course of submission, counsel acting on behalf of the applicant conceded that the documents sought to be produced would be confined to these:

(1) Documents already disclosed by respondent or SSI, and referred to by them in their respective affidavits. F

(2) Documents that ought to exist pursuant to s. 3 of the Act, but which respondent and SSI are refusing to produce or divulge.

The applicant also did not pursue discovery of the MOU dated 20 July 2009 which SSI asserted was not in its possession. G

[9] In the context of the present application, the applicant submitted that there are several important matters of fact and law of significance that are in serious dispute between the parties to the judicial review which are, *inter alia*:

(a) Whether or not SSI, the *de jure* applicant for acquisition, is a proper applicant, or indeed the *de facto* applicant (particularly in light of para. 29 of SSI's affidavit)? H

(b) Whether or not sub-s. 3(1)(b) of the Land Acquisition Act 1960 ("the Act") applies only to projects and purposes that relate to 'public utility'? I

(c) Were the documents statutorily required to be submitted under s. 3 of the Act in fact properly submitted; and did they in fact relate to (and support) the eventual land acquisition that took place?

A (d) Was (and is) the purpose of the land acquisition for a 'Deep Sea Petroleum Terminal', or for a 'Deepwater Petroleum Terminal'; and what is the difference between them?

(e) Whether or not the Department of Environment ("DOE") had in fact required SSI to acquire lands in order to provide a buffer zone on lands B belonging to others; and also whether the DOE had any power to do so in the first place?

(f) Is the Johor State Secretary the alter ego of SSI; and did his multiple roles in this matter give rise to a conflict of interest?

C (g) Was the s. 12 enquiry properly conducted on 7 December 2012, or were there breaches of natural justice?

(h) Is the resultant land acquisition bad in law, invalid, irregular, or null and void?

D **[10]** In view of the several matters and issues in serious dispute as alluded to above, the applicant's stance was that the correctness and accuracy of the respondent's and SSI's affidavit averments were being questioned and challenged. Hence, that any critical evaluation of the conflicting affidavits would not be able to resolve the serious dispute and that production of the vital documents referred to was necessary to fairly resolve the dispute. E

The Law Applicable For Discovery And Cross-Examination

[11] In regard to discovery and inspection and cross-examination in JR proceedings, these are governed specifically by O. 53 r. 6 of the ROC which provides that: F

> Discovery, etc.
>
> 6. After leave has been granted, any party to an application for judicial review may apply to the judge for discovery and inspection of documents pursuant to O. 24, to administer interrogatories pursuant to O. 26, or to cross examine the deponent of any affidavit filed in support of or in G opposition to the application pursuant to O. 38.

[12] O. 38, r. 2(2) which embodies the general rule as regards the cross-examination of the deponent of an affidavit filed in any cause or matter commenced by originating summons or in any application before the court, states that: H

> Evidence by witness statement:
>
> (2) In any cause or matter begun by originating summons and on any application made by notice of application, evidence shall be given by affidavit unless in the case of any such cause, matter or application any I provision of these rules otherwise provides or the court otherwise directs, but the court may, on the application of any party, order the attendance for cross-examination of the person making any such affidavit, and where, after such an order has been made, the person in question does not attend, his affidavit shall not be used as evidence without the leave of the court.

[13] While O. 53 r. 6 of the ROC recognises the right of any party to a JR application to apply for discovery and inspection of documents or cross-examination of deponents of affidavits pursuant to the relevant provision of the ROC the discretion lies with the court whether to grant the order sought. As with any discretionary power, it must be exercised judiciously and on correct or established principles pertinent to the exercise of the wide powers vested in the court. The facts and circumstances of each particular case are an important consideration in determining whether these are valid grounds for the powers to be invoked. A leading authority on the principle applicable for an order of discovery or cross-examination in JR proceedings is the Court of Appeal case of *Rekapacific Bhd v. Securities Commission & Anor & Other Appeals* [2005] 2 CLJ 108; [2005] 2 MLJ 269 where Gopal Sri Ram, JCA (as His Lordship then was) pronounced that:

> The second point that needs to be made – and made quite emphatically – is that it is only in very rare cases that either cross-examination or discovery or both should be permitted in judicial review proceedings. This is because questions of fact are rarely in dispute in judicial review proceedings. Of course, if there are any essential or fundamentally important questions of fact that are in serious dispute then the judicial review court would be entirely justified in ordering cross-examination to enable it to make the relevant finding of fact.

[14] In *Leisure & Allied Industries Pty Ltd v. Udaria Sdn Bhd* [1979] 1 LNS 42; [1980] 1 MLJ 189 at p. 190A the Federal Court endorsed as basic principle the proposition that every deponent of an affidavit must be prepared to be subject to scrutiny through cross-examination, on what he or she has deposed. It was held that:

> It is really a matter of common sense and en elementary legal principle that a party who swears an affidavit must be prepared to stand up to it by cross-examination unless the application to cross-examine him is without just cause, vexatious or motivated by desire to delay the proceedings.

[15] In *Datuk Amar James Wong Kim Min & Anor v. Pendaftar Pertubuhan* [2006] 8 CLJ 106; [2004] 6 MLJ 235 the High Court adopted the principle that a distinction must be drawn between JR proceedings and a writ action in granting orders for discovery or cross-examination in the former as propounded by the English Court of Appeal in *Re McGuigan's Application* [1994] NI 143 where it was held:

> It is clear on the authorities that discovery in judicial review proceedings is different from discovery in an action commenced by writ, and that discovery in judicial review is granted on a more limited basis than in an ordinary action. The reason for the restricted nature of discovery in judicial review was stated as follows by Glidewell LJ in the *Harrison*'s case: What the Judge said was: 'in my judgment the role of the court is different from its role in an ordinary action'. That is correct. It is impeccable. Judicial Review is a different sort of process from the fact

finding process which is a necessary part of any action begun by writ and the process of applying the law to the facts. Judicial review notoriously is based upon the way in which a decision has been made, not whether the decision itself was correct ...

Just as in the case of cross-examination and of interrogatories, so in the case of discovery the interest of justice requires the protection of both parties to the proceedings. That is why, in judicial review proceedings, the courts have consistently stressed that discovery will only be ordered when it is 'necessary'. It will not be granted by way of a fishing licence. Otherwise it would become oppressive. These propositions must apply to Ministers and Government Departments no less than to other parties in judicial review proceedings, save that in their case discovery may be further limited by requirements of public interest immunity.

[16] The Court of Appeal in *Rekapacific* (*supra*) referred extensively to the work entitled *Judicial Review and Crown Office Practice* by Richard Gordon on the current practice in England post amendment of its O. 53 as follows:

Cross-examination

Formerly it was exceptionally rare for applications to be made, or leave granted, for cross-examination in judicial review proceedings. In *O'Reilly v. Mackman* [1983] 2 AC 237 however, Lord Diplock, at pp. 282 to 283, took the opportunity to emphasise that:

> Whatever may have been the position before the rule was altered in 1977 in all proceedings for judicial review that have been started since that date the grant of leave to cross-examine deponents upon applications for judicial review is governed by the same principles as it is in actions begun by originating summons, it should be allowed whenever the justice of the particular case so requires.

Notwithstanding the generality of this statement there have been indications (both pre and post *O'Reilly v. Mackman*) that the court will be slow to permit cross-examination under O. 53. Note, for example, the comments of Watkins LJ in *R v. Jenner* [1983] 1 WLR 873 as to the unsuitability of judicial review for assessing questions of fact.

Discovery and inspection

Parties seeking discovery and inspection of documents may experience more difficulty than in an ordinary action, notwithstanding the incorporation of O. 24 into judicial review proceedings.

...

In general, the following principles appear to govern the grant or refusal of discovery under O. 53:

...

(c) By contrast, discovery will be ordered under O. 53 where it is required so that the justice of the case may be advanced and where it is necessary for disposing fairly of the matter (within the meaning of O. 24 r. 8) (see *R v. Inland Revenue Commissioners, ex p J Rothschild Holdings Plc* [1987] 1 STC 163; *R v. Governor of Pentonville Prison, ex p Herbage* (No 2) [1987] 1 QB 1077).

(d) Discovery will also be ordered to go behind the contents of affidavits if there was some matter before the court which suggested that the contents of the affidavits were not accurate (*Re H, The Guardian*, 17 May 1990). By contrast, discovery will not be ordered where there is no reason to doubt the *bona fides* or accuracy of the reasons given on affidavit (see *R v. Secretary of State for the Environment, ex p Islington LBC* [1992] COD 67; *R v. Secretary of State for Health, ex p LB of Hackney* [1994] 1 COD 432)."

[17] The necessity principle for the production of any documents for inspection or to the court is incorporated in O. 24 r. 13 of the ROC as follows:

(1) An order for the production of any documents for inspection or to the Court shall not be made under any of the foregoing rules unless the Court is of opinion that the order is necessary either for disposing fairly of the cause or matter or for saving costs.

(2) Where on an application under this Order for production of any document for inspection or to the Court, privilege from such production is claimed or objection is made to such production on any other ground, the Court may inspect the document for the purpose of deciding whether the claim or objection is valid.

[18] Three essential elements have been recognised as being necessary for an order of discovery to be granted, namely:

(a) The matter sought to be discovered must be a "document";

(b) The document must be "relevant"; and

(c) The document must be or have been in the "possession, custody or power" of the party against whom the order for discovery is sought.

(See *Yekambaran Marimuthu v. Malayawata Steel Berhad* [1994] 2 CLJ 581 [SSIBA Tab 6] at the headnotes

ABX Logistics (Malaysia) Sdn Bhd v. Overseas Bechtel (Malaysia) Sdn Bhd [2003] 7 CLJ 357).

[19] The principles applicable to the making of an order for production were laid down in summary by Neil, LJ in *Wallace Smith Trust Co Ltd (in liq) v. Deloitte Haskins & Sells (a firm) and Another* [1996] 4 All ER 403 at p. 412 ("the *Wallace Smith* case") as follows:

In a case, however, where the court is asked to make an order for the production of documents for inspection it is clear that an order is not to be made unless the court 'is of opinion that the order is necessary either for disposing fairly of the cause or matter or for saving costs' ...

In considering the application the court should bear in mind the words of Bingham MR in *Taylor v. Anderton* [1995] 2 All ER 420 at 434, [1995] 1 WLR 447 at 462 that the 'purpose of the rule is to ensure that one party

A does not enjoy an unfair advantage or suffer an unfair disadvantage in the litigation as the result of a document not being produced for inspection'. ...

The court should examine the facts of the individual case and in particular should consider: (a) the central issues in the action; (b) the nature of the
B documents; and (c) the information which the documents are likely to contain.

[20] The test, therefore, is necessity and not fairness *per se* discovery for the purpose of a mere fishing will not be permitted as it would be unduly oppressive to the party giving discovery. (See Court of Appeal in *Nguang*
C *Chan aka Nguang Chan Liquor Trader & Ors v. Hai-O Enterprise Bhd & Ors* [2009] 5 MLJ 40).

[21] As regards relevancy, the test is to be found in *Manilal & Sons (Pte) Ltd v. Bhupendra KJ Shan (T/A Jb International)* [1981] 1 LNS 204; [1990] 2 MLJ 282 where it was held:

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A document is relevant if it contains information which may (not which must) either directly or indirectly enable the party requiring the discovery either to advance its own case or to damage the case of his adversary or which may fairly lead to a train of inquiry which may have either of those two consequences.

E

[See also *Ong Boon Hua & Anor v. Menteri Hal Ehwal Dalam Negeri, Malaysia & Ors* [2008] 5 CLJ 42 CA].

Finding Of Court

Cross-Examination

F **[22]** The governing rule is O. 38 r. 2(2) of the ROC wherein evidence in any cause or matter begun by OS or any application by notice of application evidence shall generally be given by affidavit but the court is vested with a discretion on application to order cross-examination of any deponent. This sub-rule does not impose any condition for the order to be made. However,
G it is a discretionary power and hence, has to be exercised judicially. In exercising the court's discretion the particular facts of each case, the reliefs sought and the grounds of the application are of utmost importance.

[23] In judicial review proceedings, different considerations and principles apply. Based on the pronouncement by the Court of Appeal in *Rekapacific*
H *Bhd v. Securities Commission & Anor & Other Appeals* (*supra*) cross-examination and/or discovery can be permitted only in rare and limited circumstances. Among the exceptions is where there are serious disputes on fundamentally important questions of fact. This principle established recently is binding on this court especially in relation to JR proceedings.

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Discovery

[24] The test is simply whether in the opinion of the court the order for production of the documents requested for inspection is necessary either for disposing of fairly the cause or matter or to save costs, the first limb being applicable to this case. It is clear that the key element is necessity which is qualified by fair disposal of the case. Necessity presupposes relevancy of the document to the cause or matter. Relevancy is hence also another key element that must exist for the order to be made.

[25] However, despite the above test that applies generally for civil proceedings, on authority and principle, the same considerations and restrictions apply for discovery in JR proceedings as for cross-examination of makers of affidavits. In effect, the law is that a distinction must be drawn between discovery in a JR and a writ action. Basically, for the former it will be granted only on a limited basis where it is satisfactorily shown to be necessary in the interests of justice. Relevancy of the documents is undoubtedly a crucial factor to satisfy the test but it cannot be equated with necessity which is the predominant factor. It ought to be allowed whenever the justice of the particular case so requires. The applicant, thus, bears the onus of establishing this condition precedent for discovery to be ordered. It is the vital issue that has to be determined in this instance.

[26] The determination of the issues in this application has to be done in the context of the JR, the reliefs prayed for and the grounds canvassed for the orders of *certiorari* and declaration.

[27] Acquisition of land under s. 3 of the LAA is within the powers vested solely in the State Authority ('SA'). No powers in the acquisition process are conferred on the Land Administrator ('respondent') whose statutory function is confined to receiving the application made under sub-s. 1(b) or (c) of s. 3 of the LAA. The SA is not a party to the JR. A previous JR application to quash the decision of the SA *via certiorari* to issue a declaration in Form D under s. 8 of the LAA has been dismissed by this court. The judgment of this court which has not been set aside on appeal still stands and is binding. Nevertheless, as the applicant has prayed for a declaratory order to declare the acquisition under s. 3(1)(b) of the LAA as invalid and bad in law, the issue as to the validity of the acquisition order is still open for adjudication. Whether the court is *functus officio* on this issue or whether the JR to challenge the decision of the SA in the instance after this having failed in the previous JR proceeding is an abuse of the court process is a matter to be litigated in the substantive hearing. As it stands, based on declaratory relief prayed for, the validity of the acquisition by the SA of the subject land under s. 3(1)(b) of the LAA is an issue in dispute in this JR proceeding. In opposing the application in its entirely, the LA has sworn an affidavit in opposition containing a variety of averments of facts and on the law, which are the subject of serious dispute between the parties.

[28] The fundamental issue of fact that is the subject of serious dispute in the context of the validity in law of the acquisition concerns the claim that the subject land was required as a buffer zone for the petroleum project as a result of the condition imposed by the DOE. Hence, the facts deposed to by the LA pertaining to this issue are relevant and fundamental to the JR proceeding and would be necessary to be fully ascertained for the fair disposal of the proceeding. The same would apply to the documents pertaining to this issue of fact of fundamental importance to the adjudication of the instant JR application.

Affidavit In Opposition ('AIO') By SSI

[29] Most of the averments by the deponent on behalf of SSI are on issues or points of law in the nature of opinions and submissions to oppose the averments of the applicant in support of the JR. The only fundamental issue of fact deposed to concerns the reason as to why SSI applied for additional lands to be acquired, including the subject lot (Lot 1208) which is that a 'buffer zone' was required by the DOE. This is an assertion of the existence a particular fact. Hence, it is a matter for the deponent to prove if denied by the applicant. As no evidence in support thereof of the fact in issue was produced, it was not the subject of cross-examination of the deponent.

[30] The allegation made that the present JR application was an abuse of process of the court by virtue of a previous application by the same applicant/landowner having been dismissed is an issue of law entirely for the court's determination. Likewise, the view expressed that any dissatisfaction in the conduct of the land enquiry by the respondent under s. 12 of the LAA, the valuation done of the subject/scheduled land or the award/decision made should be addressed in the Form N and the ensuing land reference proceedings upon an objection being filed by the applicant. These too are not issues that necessitate cross-examination of the deponent in the interests of justice for the cause or matter to be disposed of fairly.

AIO By Respondent

[31] The deponent has made several averments of fact that are the subject of serious dispute although they relate to the validity of the decision of the SA to acquire the subject land purportedly needed by any person or corporation for a private purpose. The most important among these is the assertion that the subject land was required by the DOE to be made a buffer zone for the petroleum project of SSI and thus, had to be acquired. Secondly, pertaining to the zoning of the subject land for commercial development which was eventually rejected by the LA and the alleged conflict of interest between SSI and the State Secretary ('SUK') arising from the acquisition of the subject land on the application of SSI. Thirdly, pertaining to the land enquiry having been conducted in accordance with law and procedure with sufficient

consideration being given to the valuation of the subject land on the evidence produced by the applicant. These are matters of fact in serious conflict that are yet to be resolved on vital affidavit evidence and hence, would justify cross-examination of the deponent to fairly decide the issue in dispute in the JR.

Conclusion

[32] Based on the established principles as adverted to relating to discovery and cross-examination of witnesses in JR proceedings that the applicable test is whether the vital elements of relevancy and necessity for fair disposal of the matter in dispute have been satisfied, discovery and cross-examination are allowed as below:

Discovery

The order granted is confined to documents clearly identified as being necessary in the interest of justice and referred to by the deponent of the respondent's and SSI's affidavits in opposition.

In respect of the respondent, prayer (2) paras. (c) and (d) are allowed while in respect of SSI, prayer (4) paras. (c), (e) and (d) are allowed.

Cross-Examination

The order is granted only against the deponent of the respondent's AIO confined specifically to factual issues and matters deposed to by him (Prayer (5) only)